No. 74-132

Supreme Court, U. S.
FILED
MAR 21 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

JEAN GLODGETT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

REPLY BRIEF FOR THE APPELLANT

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1. Appellees contend (Brief, p. 38) that "[t]he plain meaning of Section 607(b)(2)(C)(ii) is that Congress was concerned that a family could receive concurrent payments of unemployment compensation and AFDC-UF." To the extent this contention suggests that Congress was concerned with double payments, it finds no support in either the legislative history of the statute or in the history of the operation of the AFDC program.

In 1961, when AFDC was first extended to children of unemployed parents, states were given the option to deny in whole or part AFDC benefits to which a child was otherwise entitled if a parent received unemployment compensation. Where a state elected not to deny AFDC if unemployment compensation was received, the result was that unemployment compensation was treated like any other resource, *i.e.*, it was considered in establishing need. See

Department of Health, Education and Welfare, Handbook of Public Assistance Administration, Pt. IV, §3424.26 (1963); S. Rep. No. 165, 87th Cong., 1st Sess., p. 2. Thus, the risk of concurrent or double payments never existed.

To the extent appellees suggest that Congress intended to preclude concurrent (but not double) payments, their contention is correct, but it does not support their claim to relief. In 1968, when Congress replaced the optional provision with the mandatory bar, it sought to reestablish the traditional reliance on unemployment compensation as the primary source of assistance for the unemployed, and to insure that AFDC was available only as a program of last resort.

There is no dispute that at a minimum, in enacting the 1968 amendments, Congress intended that AFDC benefits be terminated if a father received unemployment compensation. Thus, the only question of statutory construction is whether Congress intended to give fathers an option to decline unemployment compensation. As shown in our main brief, the district court's conclusion that such an option existed is contrary to the structure of the Act, its legislative history, and consistent administrative construction.

We add only that the district court decision renders the mandatory bar provision a nullity and, in practical effect, assumes that Congress intended to discourage unemployed fathers from receiving unemployment compensation. That assumption is incorrect. In 1968 Congress was concerned with the escalating costs of the welfare program. It is inconceivable that Congress intended to exacerbate that problem by permitting the shifting of significant costs of assisting the unemployed from unemployment compensation programs to AFDC.

2. Appellees correctly point out that as the prevailing party below they are entitled to rely on any ground supported by the record in seeking affirmance of the district court judgment (Brief, p. 62). Appellees urge that if this Court concludes that the district court's construction of Section 607 is erroneous, it should then consider their constitutional claim. Although we have suggested that the case should be remanded for consideration of the constitutional issue, we are responding to appellees' arguments should this Court reach the question.

Appellees contend that the mandatory bar provision impermissibly discriminates against a class of children solely on the basis of the source of their father's income. Appellees' claim is one of underinclusiveness—that is, they argue that the mandatory bar provision constitutes invidious discrimination because children whose fathers receive unemployment compensation have their AFDC benefits terminated without regard to their "need" status.

Appellees recognize that the mandatory bar provision must be analyzed under the "rational basis" test which this Court has traditionally applied to review of welfare legislation. Under that test a statute must be upheld if the goals are legitimate and the legislative classification is rationally related to the accomplishment of the congressional purpose. See *Jefferson* v. *Hackney*, 406 U.S. 535; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Dandridge* v. *Williams*, 397 U.S. 471.

Implicit in appellees' constitutional claim are the premises that either it is in fact the goal of the AFDC program to provide benefits to all persons on the basis of need, or, alternatively, that Congress is constitutionally obligated to operate the program in that fashion. Neither premise is correct.

AFDC has never been and is not now a comprehensive public assistance program. From its inception in 1935 until 1961 AFDC was not available to families with unemployed fathers. Although the program was so extended in 1961, state participation was not made mandatory, and at the present time only 25 states have AFDC-UF programs. Moreover, AFDC has never been available to families with an employed father even though a family's income level may fall below the need standard applicable to AFDC programs. See 42 U.S.C. 606(a) and 607(b); see also *Henry* v. *Betit*, 323 F. Supp. 418 (D. Alaska).

Although the goal of the AFDC program is to assist families who are in need, confronted with a finite amount of funds available for this purpose, Congress has chosen to allocate public assistance to those classes of families who are least able to change their circumstances. Historically, Congress has relied on minimum wage laws and collective bargaining, rather than AFDC, to assist the employed (*Macias* v. *Finch*, 324 F. Supp. 1252 (N.D. Cal.), affirmed *sub nom. Macias* v. *Richardson*, 400 U.S. 913), and on unemployment compensation as the primary means of assisting families with an unemployed father. See our main brief, pp. 19-20. Although that distinction was blurred in 1961 when AFDC was extended to families with unemployed fathers, it was essentially reestablished in 1968 with the enactment of the mandatory bar provision.

If equal protection principles require the extension of AFDC benefits to families where the father receives unemployment compensation, it is difficult to see why logically they do not also require the extension of AFDC to families where the father is employed—in short, they would require the development of a comprehensive public assistance program. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495. But we submit that adoption of a comprehensive public assistance program is not consti-

tutionally required. The desirability of such a course of action is a matter for legislative determination and requires a resolution of conflicting interests and policies as to which there has historically been no consensus. See generally Moynihan, *The Politics of a Guaranteed Income* (1973).

Given the congressional goal of providing public assistance within a framework of limited funds, the exclusion of families where an unemployed father receives unemployment compensation has a rational basis.It is consistent with the historical reliance on unemployment compensation as the first line of defense for the unemployed, and, as recognized in *Burr* v. *Smith*, 322 F. Supp. 980, 985 (W.D. Wash.), affirmed, 404 U.S. 1027, unemployment compensation benefits promote attachment to the labor force, and such benefits "* * * which [are] temporary in nature, may act as a greater incentive for the unemployed to seek new employment than the receipt of welfare assistance." In many cases unemployment compensation benefits will approximate or exceed AFDC benefit levels and where unemployment compensation is inadequate it may be supplemented by other state assistance programs.[1] Finally, as pointed out in our main brief, states may upgrade their unemployment compensation and assistance programs.[2] Moreover, the exclusion is only temporary because of the limited duration of unemployment compensation benefits.[3] Upon the expiration

[1]Vermont has such an assistance program. As noted in our main brief, however, the level of benefits available is not shown in this record.

[2]As appellees' brief points out (App. B, p. 1b), since 1972 14 of the 25 states that have both unemployment compensation and AFDC-UF programs have upgraded their unemployment compensation programs. See also *Burr* v. *Smith, supra*, 322 F. Supp. at 982, n. 1.

[3]Under Vermont law, unemployment benefits are payable for a maximum of 26 weeks unless, in certain circumstances, they are extended for 39 weeks. See 21 V.S.A. 1340, 1421. In addition, under the Emergency Unemployment Act of 1974, Pub. L. 93-572, 88 Stat. 1869, under certain conditions, an additional 13 weeks (for a maximum of 52) of benefits, payable from federal funds, is available.

of such benefits, if the father remains unemployed, AFDC benefits are restored, assuming other eligibility conditions are satisfied.

We do not contend that the mandatory bar is the wisest or most socially desirable policy that could be devised, but we do submit that its rejection, on constitutional grounds, would entail a consideration of factors that this Court has repeatedly held inappropriate for judicial resolution. See, *e.g.*, *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 541; *Dandridge* v. *Williams*, *supra*, 397 U.S. at 487; see also Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1082-1087, 1192 (1969).

For the foregoing reasons, and for the reasons set forth in our main brief, the judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1975.

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